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I. INTRODUCTION

The Trade Act of 1974[1] represents the fundamental trade policy of the United States. Its statement of purpose sets forth the goal of promoting free world trade while fostering the economic strength of domestic industries.[2] This policy is further embodied in the United States commitment to the General Agreements on Tariffs and Trade (GATT).[3] Guided by this policy, the Trade Act sets out a carefully designed procedure for implementing import relief.

In general, a petition for import relief is submitted to the International Trade Commission (ITC) by a domestic industry, firm, workers' association,[4] or the President of the United States.[5] The ITC is an autonomous entity composed of six commissioners, appointed by the President,[6] whose function is to conduct a factual investigation and determine whether import relief is warranted.[7]

Upon an affirmative finding by a majority of the commissioners that a situation warrants import relief, the ITC issues its report, along with its recommendation as to the appropriate remedy, to the President of the United States.[8] An affirmative finding by the ITC triggers the President's action,[9] which may include, *inter alia*, unilateral import restrictions such as tariffs, duties, or import quotas, or bilateral restric-

1. Pub. L. No. 93-618, 88 Stat. 1978 (1974) (codified as amended at 19 U.S.C. §§ 2101-2487 (Supp. 1980)).
2. 19 U.S.C. § 2102 (1976).
3. *See infra* text accompanying notes 66-86.
4. 19 U.S.C. § 2251(a)(1) (1976).
5. 19 U.S.C. § 2251(b)(1) (1976).
6. 19 U.S.C. § 1330(a) (1976).
7. 19 U.S.C. § 1332 (1976).
8. 19 U.S.C. § 2251(d)(1) (1976).
9. 19 U.S.C. § 2252 (1976).

tions such as an Orderly Marketing Agreement (OMA).[10]

A problem arises when the ITC issues a negative finding, indicating that the situation does not warrant import relief, but domestic pressures for import relief persist. This often occurs when the facts do not overwhelmingly weigh against the need for import relief. The controversial nature of the situation may be reflected in divergent views among the commissioners themselves.

An example of such a situation occurred in 1980 when the United States automobile industry petitioned the ITC for relief from the importation of Japanese automobiles. In a controversial three-to-two decision, the ITC ruled that the situation did not justify import relief.[11] Following the ITC determination, domestic and industrial forces continued to exert pressure on Congress for some form of relief.[12] As a result, Congress proposed resolutions to authorize the President to provide import relief in the form of an OMA notwithstanding the ITC's finding.[13] Ultimately, the Japanese government announced its decision to voluntarily restrict its exports of automobiles to the United States.[14] A formal OMA was never negotiated.

The 1980 automobile situation illustrates the problem which arises when there is strong disagreement among the domestic industry, importers, retailers, members of Congress, the President, and even among the commissioners themselves, as to the propriety of import relief in the particular circumstances. The Trade Act does not contain provisions for resolving such disagreement.[15] The Act merely directs the ITC to determine whether import relief is or is not warranted. That determination is final, subject only to a contrary finding by the ITC itself fol-

10. An Orderly Marketing Agreement is an agreement between the importing and exporting governments by which the exporting nation agrees to restrain its exports targeted toward the importing nation. For an in-depth discussion of OMAs, see *infra* text accompanying notes 54-91. The five means of import relief are set forth at 19 U.S.C. § 2253(a) (1976).

11. *See infra* text accompanying notes 96-100.

12. *See, e.g., Auto Situation: Autumn 1980 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 7 (1980) [hereinafter cited as *Hearings*].

13. *See infra* text accompanying notes 101-06.

14. *See infra* text accompanying notes 110-12.

15. Although the ITC has six commissioners, only five participated in the automobile import investigation and hearings. In a proceeding in which the commissioners are equally divided with respect to whether increased imports are a substantial cause of serious injury, the President may accept the determination agreed upon by either group of commissioners as the determination of the ITC. 19 U.S.C. § 1330(d)(1) (1976). The controversy discussed in this Note, however, arises when a majority of the commissioners are in agreement, but industrial and other domestic groups disagree with the ITC determination.

lowing a reinvestigation.[16]

The reaction to the ITC's finding in the 1980 automobile situation was not a request for a reinvestigation. Rather, Congress responded by proposing resolutions authorizing negotiation of an OMA.[17] Such Congressional resolutions would be a means of obtaining import relief completely outside the procedures in the Trade Act. The legislation proposed by Congress, however, does not provide a solution to the inadequacy of the Trade Act and in fact creates a problem of greater magnitude.

If the United States is to maintain its commitment to the fundamental policy of the Trade Act, the role of the ITC as an independent fact-finding body must be preserved. The very purpose of interposing the ITC into the process is to ensure that the decision to impose import relief is free from both industrial and political influences.[18] To authorize import relief in defiance of a negative ITC determination would undermine the function of the ITC and make a mockery of the trade policy set forth in the Trade Act.

The present Trade Act is not equipped to resolve the conflict which emerges from a negative ITC finding when industrial and other external forces continue to exert pressure for import relief. This deficiency could be cured by a simple amendment of the Act, which would allow an intermediate finding. With such amendment, the ITC could make one of three findings:

1. The situation does not warrant any form of import relief;
2. the situation warrants only an OMA; or
3. the situation warrants any form of import relief, including an OMA.

The Act presently permits the ITC to issue a finding either that the situation warrants no form of import relief or that the situation warrants import restrictions or adjustment assistance for the domestic industry.[19] The ITC may only issue a single type of affirmative finding, which has the potential of triggering either bilateral import relief negotiations or harsher unilateral import restrictions. The Act should be amended to provide two different types of affirmative findings, one

16. Once the ITC issues its finding, no investigation is to be made with respect to that same subject matter until one year has elapsed, unless the ITC finds that good cause exists for reinvestigation. 19 U.S.C. § 2251(e) (1976).

17. *See infra* text accompanying note 105.

18. *See infra* text accompanying notes 130-41, concerning effect on the Trade Act of 1974.

19. 19 U.S.C. § 2251(d)(1) (1976).

which would trigger any form of import relief and another which would trigger only negotiation of an OMA. In situations where import relief is neither obviously warranted nor unwarranted, the ITC would be able to recommend some form of import relief, such as an OMA, for an ailing domestic industry without the fear that its affirmative finding might trigger one of the harsher, unilateral types of import relief.[20]

II. THE 1974 TRADE ACT

A. Background

In 1973, the Nixon administration introduced a bill providing for comprehensive changes in existing foreign trade statutes in an effort to forestall mandatory quotas on imports.[21] The result was the Trade Act of 1974,[22] which replaced the Trade Expansion Act of 1962.[23] Under Title III of the 1974 Act, import relief is available upon a determination of unfair, unjustifiable, unreasonable, or discriminatory trade practices.[24] Title II provides import relief measures where injury to a domestic industry is caused by entirely fair, nondiscriminatory and nonrestrictive trade practices.[25]

While continuing the policy of the 1962 Trade Expansion Act to

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20. Harsher types of import relief could take the form of duties, tariff-rate quotas, or quantitative restrictions on an imported article. *See* 19 U.S.C. § 2253(a) (1976). Most importantly, such an amendment would serve three functions:

1. it would enable the FTC to respond to controversial fact situations with some form of import relief (an OMA) rather than with a negative finding;
2. the import relief imposed would be a voluntary government-to-government agreement, thus reducing the possibility of adverse repercussions, violation of the General Agreements on Tariffs and Trade, or U.S. antitrust laws; and,
3. the autonomy and independent function of the ITC would be preserved.

21. Adams & Dirlam, *Import Competition and the Trade Act of 1974: A Case Study of Section 201 and its Interpretation by the International Trade Commission*, 52 IND. L.J. 535, 539 (1977).

22. *See* H.R. 62, 93d Cong., 1st Sess. (1973), Pub. L. No. 93-618, 88 Stat. 1978 (1974) (codified at 19 U.S.C. §§ 2101-2487).

23. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 301(b)(1), 76 Stat. 884, 19 U.S.C. §§ 1901-1991 (1970) (repealed 1975).

24. Trade Act of 1974, Title III, 19 U.S.C. §§ 2271-2394 (1980).

25. Trade Act of 1974, Title II, 19 U.S.C. §§ 2251-2270 (1980). The Trade Act's statement of purpose reads, in part:

> The purposes of this chapter are, through trade agreements affording mutual benefits—
>
> (1) to foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries through open and nondiscriminatory world trade. . .[and]
>
> (4) to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition. . . .

foster reductions in international trade barriers, the 1974 Act simultaneously provides additional protection for domestic industry from the harmful effects of foreign competition.[26] The most significant difference between the two trade acts is the change in the standard used as a prerequisite for import relief. The 1962 Act required as a prerequisite for import relief that imports be a major cause of a domestic industry's injury.[27] In defining "major cause," the Commission took the view that the effect of imports had to be more important than all other causes combined.[28] Under the 1962 Act, American industries, individual firms, and workers had been relatively unsuccessful in obtaining relief.[29]

Congress revised the injury standard in the Trade Act of 1974, requiring the ITC to determine whether imports are a substantial cause rather than a major cause of injury before making an affirmative finding.[30] "Substantial cause" is defined as a cause which is important and is not less important than any other cause.[31] If there is more than one cause of injury, then imports must be at least as important as any other cause to constitute a substantial cause.[32] Furthermore, the 1974 Act dropped the requirement that the increase in imports be the result of prior trade concessions.[33]

B. Title II of the 1974 Act: Relief from Injury Caused by Entirely Fair Import Competition

1. Institution of Proceedings

The purpose of providing import relief under Title II is to "facilitat[e] orderly adjustment to import competition. . . ."[34] Peti-

26. *See* Recent Developments, *Trade Law*, 9 GA. J. INT'L & COMP. L. 654, 659 (1979).

27. 19 U.S.C. §§ 1901-1991 (1970) (repealed 1975).

28. *See* Adams & Dirlam, *supra* note 21, at 561.

29. *See* COMM'N ON INT'L TRADE AND INVESTMENT POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, 49-50 (1971).

30. 19 U.S.C. § 2251(b)(1) (1976).

31. 19 U.S.C. § 2251(b)(4) (1976).

32. *See* H.R. REP. No. 471, 93d Cong., 1st Sess. 46 (1973).

33. Section 301 of the 1962 Act required that the Commission make an investigation to determine "whether, *as a result in major part of concessions granted under trade agreements*, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry . . ." (emphasis added). Trade Expansion Act of 1962, *supra* note 23. The 1974 Act dropped the phrase, "as a result in major part of concessions granted under trade agreements." 19 U.S.C. § 2251(b)(1) (1976). *See also* S. REP. No. 1298, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7205.

34. 19 U.S.C. § 2251(a)(1) (1976).

tions for import relief "may be filed with the [ITC] by an entity, including a trade association, firm, certified or recognized union, or group of workers, which is representative of an industry."[35] Requests for an investigation may also be submitted by the President, the United States Trade Representative, the House Ways and Means Committee, and the Senate Committee on Finance.[36] The ITC may also conduct an investigation upon its own motion.[37]

2. The ITC Investigation and Report

Upon receiving a petition, the ITC must promptly determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat to the domestic industry producing an article like or directly competitive with the imported article.[38] Before authorizing import relief measures, the ITC must make three findings:[39]

1. imports of the industry in question have increased;[40]
2. the American industry in question has been seriously injured or is threatened with serious injury;[41] and
3. the increased imports are a substantial cuase of the serious injury or the threat thereof.[42]

Much controversy stems from the lack of specific criteria for the ITC's determination of substantial cause. The statute sets forth economic factors which the ITC should consider in making its determina-

35. *Id.* There is no rule specifying who or what is "representative of an industry" and the ITC approaches the issue on a case-by-case basis. *See* Leonard & Foster, *The Metamorphosis of the U.S. International Trade Commission Under the Trade Act of 1974*, 16 VA. J. INT'L L. 719, 733-34 (1976). Mr. Leonard was Chairman of the ITC at the time he wrote this article.

36. 19 U.S.C. § 2251(b)(1) (1976).

37. *Id.*

38. *Id.*

39. *Id.*

40. "Either an absolute increase or an increase relative to domestic production will satisfy the criterion. . . . In deciding whether imports are entering the United States in 'increased quantities,' the Commission examines import trends over a period of years, usually looking no further back than 1968." *See* H.R. REP. No. 1644, 93d Cong., 2d Sess. 33 (1974).

41. A problem with determining import-caused injury is that imports may in fact provide an incentive to the American industry to improve its performance and the quality of its products. "[I]mports may seem to contribute to the health rather than the weakness of a domestic industry." Adams & Dirlam, *supra* note 21, at 561. There are also problems in defining a particular industry and economic problems in measuring degree of injury. *See generally id.* at 544-60.

42. *See id.* at 540; Leonard & Foster, *supra* note 35, at 740; U.S. INT'L TRADE COMM'N, PUB. NO. 746, WRAPPER TOBACCO: REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-3 (1975).

tion.[43] The economic factors listed are not, however, intended to be exclusive. The ITC is directed by statute to take into account all economic factors which it considers relevant.[44] For example, the ITC studies the efforts by firms and workers in the industry to compete more effectively with imports.[45] If the ITC finds that imports are a substantial cause of injury to a domestic industry, the ITC reports its affirmative finding to the President,[46] recommending a type and level of import relief sufficient to compensate for the injury.[47]

3. President's Action upon Receipt of the ITC Report

Upon receipt of an ITC report containing an affirmative determination, the President may either:

1. accept the ITC's recommended remedy;[48]
2. conduct an additional inquiry, calling on the ITC and other sources for additional information;[49]
3. reject the ITC recommendation and propose his own remedy;[50] or
4. determine that the provision of import relief is not in the national economic interest of the United States and that he will not provide import relief.[51]

The determination of the exact terms of the relief is up to the President.[52] Relevant factors he may consider are listed in the statute.[53]

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43. 19 U.S.C. § 2251(b)(2) (1976).
44. *Id.*
45. *See* Lorinczi & O'Sullivan, *Import Relief under the Trade Act of 1974*, 22:6 PRAC. LAW. 61, 62 (1976).
46. 19 U.S.C. § 2251(d)(1) (1976).
47. *Id.*
48. 19 U.S.C. § 2252(b) (1976).
49. 19 U.S.C. § 2252(d) (1976).
50. 19 U.S.C. § 2252(b)(1) (1976).
51. *Id.*
52. 19 U.S.C. § 2252(b) (1976).
53. The President may take into account the extent to which workers and firms in the industry are receiving or are likely to receive adjustment assistance, the efforts made by the industry to adjust to import competition, the effect of import relief on consumers and on competition in the domestic markets for articles produced by the industry, the effect of import relief on the international economic interests of the United States, the possibility of becoming liable for compensating foreign industries as a result of international obligations, the geographic concentration of imported products marketed in the United States, the extent to which the United States market is the focal point for exports of such article by reason of restraints on exports of such article to third country markets, the economic and social costs which would be incurred by taxpayers, communities, and workers, if import relief were or were not provided, and any other considerations he may deem relevant. 19 U.S.C. § 2252(c) (1976).

When the President decides to provide import relief, he must transmit to Congress a report setting forth the action to be taken.[54] If the President's announced action differs from the action recommended by the ITC, or if the President determines that he will not provide import relief, Congress may override the President's decision and uphold the ITC recommendation.[55]

The types of import relief available under section 203 of the Trade Act include:

1. an increase in, or imposition of, a duty;
2. a tariff-rate quota;
3. modification of, or imposition of, an import quota;
4. the negotiation of an OMA with foreign countries, limiting the exports from foreign countries; or
5. any combination of these actions.[56]

The President may negotiate an OMA after he has imposed one of the other forms of import relief, in which case the OMA would replace such other relief.[57] If the President negotiates an OMA and such agreement does not continue to be effective, he may impose an alternative form of import relief as listed in the statute.[58]

III. ORDERLY MARKETING AGREEMENTS

An Orderly Marketing Agreement is "an arrangement by which national governments agree among themselves, often tacitly and without any legal force, in the sense of a treaty, that an exporting country will restrain its exports targeted toward an importing country with which it is negotiating."[59] OMAs involve formal and informal government-to-government agreements, in which the governments deal directly with each other and negotiate the OMA. Most government-to-government agreements are intended to be binding.[60] This type of export-restraint agreement may be monitored and enforced by the importing country's own customs officials. Agreements negotiated pursuant to section 203 of the Trade Act[61] and based upon prior find-

54. 19 U.S.C. § 2253(b)(1) (1976).

55. 19 U.S.C. § 2253(c)(1) (1976). *See* U.S. INT'L TRADE COMM'N, PUB. NO. 756, SPECIALTY STEEL (Jan. 1976).

56. 19 U.S.C. § 2253(a) (1976) [hereinafter referred to as section 203 of the Trade Act].

57. 19 U.S.C. § 2253(e)(2) (1976).

58. 19 U.S.C. § 2253(e)(3) (1976).

59. Jackson, *Orderly Marketing Arrangements; A Panel*, 72 AM. SOC'Y INT'L L. PROC. 1 (1978) [hereinafter cited as *OMA Panel*].

60. *See id.* at 2.

61. *See supra* text accompanying note 56.

ings of injury to domestic producers by the ITC are regarded as OMAs.[62]

Other restraint arrangements are regarded as Voluntary Restraint Agreements (VRAs).[63] These agreements generally do not involve government-to-government discourse and are less formal than OMAs.[64] The United States government merely encourages a foreign industry or government to exercise self-restraint in the exportation of its goods to the United States market. VRAs are enforced only by the exporting country and are not intended to be binding.[65]

A. OMAs in the Context of GATT

In 1947, twenty-three countries met in Geneva and established a framework for periodic international negotiations to deal with tariff reductions and eliminate discrimination and unfair trade practices.[66] This framework was set forth in a document entitled General Agreement on Tariffs and Trade (GATT).[67] The United States Congress was opposed to joining this international trade organization;[68] nevertheless, by way of an executive agreement signed by President Truman,[69] the United States joined twenty-two other countries in signing a Protocol of Provisional Application of the GATT.[70]

Article I of GATT sets forth the contracting parties' commitment to "most-favored nation" treatment: "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[71] This commitment has

62. *See OMA Panel, supra* note 59, at 12.

63. *Id.* at 1.

64. *Id.*

65. *Id.*

66. *See generally* M. KOSTECKI, EAST-WEST TRADE AND THE GATT SYSTEM (1979).

67. General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A5 T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT].

68. *See* Gryzbowski, Reid & Stepanyenko, *Towards Integrated Management of International Trade—The U.S. Trade Act of 1974*, 26 INT'L & COMP. L. Q. 283, 297-98 (1977).

69. On December 16, 1947, President Truman issued Proclamation 2761A, "Carrying Out General Agreements on Tariffs and Trade Concluded at Geneva, October 30, 1947." *See* Proclamation No. 2761A, 3 C.F.R. 139 (1947).

70. GATT came into force for the United States on January 1, 1948, pursuant to a protocol for provisional application. GATT, *supra* note 67, at 3. To date, 87 countries have joined the GATT organization. Pine, *GATT Caseload Rises as International Trade Meets Serious Strains*, Wall St. J., April 9, 1982, at 1, col. 6.

71. GATT, art I(1), *supra* note 67, 61 Stat. A12, T.I.A.S. No. 1700 at 8, 55 U.N.T.S. at 189.

been amended to some extent by the 1979 Tokyo Round of the Multinational Trade Negotiations, which provides that developed countries may accord developing countries certain tariff and nontariff preferential treatment within the context of GATT.[72]

GATT contains a number of escape clauses which permit a member country to respond to domestic pressures while remaining a participant in the Agreement. Article XIX permits a contracting party to suspend obligations under GATT

> [i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement . . . any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products. . . .[73]

Such safeguard actions should be used without discrimination against particular exporting countries because of the contracting parties' commitment to most-favored nation treatment.[74] OMAs, however, involve government-to-government export restriction agreements. Thus, by their very nature, OMAs involve discrimination against certain exporting states rather than nondiscriminatory action on a product-sector selective basis.[75]

Title II of the Trade Act of 1974 is the present United States legislation implementing the escape clause provisions of Article XIX of GATT.[76] Unlike Article XIX, however, import relief under the Trade Act of 1974 carries no prerequisite that increased imports be the result of unforeseen developments or of GATT obligations.[77]

Orderly Marketing Agreements, as agreements negotiated between governments, are distinguishable from unilateral trade restraint actions in the context of GATT. The exporting nation's acquiescence should preclude it from asserting any GATT violation.[78]

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72. *See generally* Recent Developments, *International Trade: GATT Tokyo Round*, 20 HARV. INT'L L.J. 695 (1979); Meier, *The Tokyo Round of Multilateral Trade Negotiations and Developing Countries*, 13 CORNELL INT'L L.J. 13 (1980); Strauss, *The Tokyo Round: Its Meaning and Effect*, 9 GA. J. INT'L & COMP. L. 151 (1979).

73. GATT, art. XIX(1)(a), *supra* note 67, at 58.

74. *See supra* text accompanying note 71.

75. *See GATT's Trade Talks*, Economist, June 17, 1978, at 86, 87.

76. 19 U.S.C. §§ 2251-2270 (1976). *See supra* text accompanying notes 34-58. Article XIX requires that the increased imports must be the result of "unforeseen developments" and of the effect of obligations incurred under GATT. *See supra* text accompanying note 73.

77. *See OMA Panel, supra* note 59, at 2.

78. Absent any "genuine claim of coercion or some other recognized Vienna Conven-

In the 1978 case of *Sneaker Circus, Inc. v. Carter*,[79] shoe importers brought an action to set aside two OMAs negotiated between the United States and the governments of the Republic of China (Taiwan) and the Republic of South Korea. President Carter had ordered the negotiation of OMAs pursuant to the Trade Act of 1974, after receiving a report from the ITC.[80] Plaintiffs in *Sneaker Circus* argued that the OMAs violated the most-favored nation provisions in GATT.[81] Judge Costantino held this argument to be without merit on the ground that "Congress has never ratified GATT."[82] Judge Costantino continued, "Moreover, even if GATT were applicable, it specifically provides for suspension of the obligations of the Agreement in the event that imports of a given product into any country cause or threaten serious injury to domestic producers of the same or competitive products."[83] The court noted that the language of section 201(b)(1) of the Trade Act[84] very closely tracks the language of the Article XIX GATT escape clause.[85] Thus, it seems that an OMA negotiated pursuant to section 201 of the Trade Act of 1974[86] raises no GATT violation.

B. OMAs in the Context of Treaties of Friendship, Commerce and Navigation

Nations attempt to limit disruptive trade practices by entering into bilateral treaties such as the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan.[87] This treaty contains two key concepts: national treatment, and most-favored nation treatment.[88] National treatment is defined as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies,

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tion ground, or other ground in international law for avoiding a treaty or obligation," the exporting nation's acquiescence should preclude it from asserting any GATT violation. *OMA Panel, supra* note 59, at 7 (citing Vienna Convention on the Law of Treaties, arts. 46-64, U.N. Doc. A/CONF. 39/27).

79. 457 F. Supp. 771 (E.D.N.Y. 1978), *aff'd* 614 F.2d 1290 (2d Cir. 1979).

80. 457 F. Supp. at 789.

81. *Id.* at 795.

82. *Id.* (citing United States v. Yoshida Int'l, Inc., 526 F.2d 560, 575 n.2 (C.C.P.A. 1975)).

83. 457 F. Supp. at 795 (citing GATT art. XIX).

84. 19 U.S.C. § 2251(b)(1) (1976).

85. 457 F. Supp. at 795 n.36.

86. 19 U.S.C. § 2251 (1976).

87. Treaty of Friendship, Commerce & Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

88. *See* Note, *Indexes of Selected Bilateral Treaties: United States and Japan*, 2 HASTINGS INT'L & COMP. L. REV. 105, 117 (1979).

products, vessels, or other objects, as the case may be, of such Party."[89] Most-favored nation treatment is defined as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country."[90] Under most-favored nation treatment, no restrictions or prohibitions on import or export of products may be imposed unless similar restrictions apply to third countries. Restrictions may be imposed on noncommercial grounds, however, or to prevent deceptive or unfair trade practices.[91]

The United States District Court in *Sneaker Circus* held that OMAs did not violate the most-favored nation provisions of the treaties at issue because the import quotas under OMAs were negotiated, not imposed.[92] The court noted that the Trade Act of 1974 permits the President to act without regard to most-favored nation status[93] and specifically provides that the President may negotiate OMAs.[94] Regarding inconsistent provisions between the Trade Act of 1974 and friendship treaties entered into prior to 1974, the court added: "[T]o the extent that such provisions of the Act are inconsistent with the provisions of the Friendship Treaties, the provisions of the Act would apply since they were enacted subsequent to those treaties."[95]

IV. AN ILLUSTRATIVE PROBLEM: UNITED STATES AUTOMOBILE INDUSTRY, 1980-81

In 1980, pursuant to petitions filed by the United Auto Workers union and Ford Motor Company, the ITC conducted an investigation into the effect of Japanese automobile imports on the United States automobile industry.[96] On November 10, 1980, the ITC issued its de-

89. Treaty of Friendship, Commerce & Navigation, *supra* note 87, art. XXII, at 2079.
90. *Id.*
91. *Id.* art. XIV, at 2074.
92. 457 F. Supp. at 795.
93. *Id.* (citing 19 U.S.C. § 2253(k)(1) (1976)).
94. *Id.* at 795 (citing 19 U.S.C. § 2253(k)(1) (1976)).
95. *Id.* at 795 (citing Akins v. United States, 551 F.2d 1222, 1229 (C.C.P.A. 1977)).
96. U.S. INT'L TRADE COMM'N, PUB. NO. 1110, CERTAIN MOTOR VEHICLES AND CERTAIN CHASSIS AND BODIES THEREFORE, REPORT TO THE PRESIDENT ON INVESTIGATION TA-210-44 UNDER SECTION 201 OF THE TRADE ACT OF 1974, at 1 (Dec. 1980) [hereinafter cited as *ITC Report*]. The United States automobile industry experienced an accelerated deterioration in 1979-80. United States production of automobiles declined eight percent in 1979; production was down 29% in the first six months of 1980 compared to production in the same period in 1979. *Id.* at A-27. The average number of workers employed in United States establishments producing passenger automobiles and light trucks declined by three

termination by a vote of three-to-two that Japanese automobile imports were not a substantial cause of serious injury to the domestic auto industry.[97]

According to the ITC, the plight of the United States automobile industry was not the result of import competition alone, but rather a result of other factors including:

1. the decline in demand for automobiles, brought about by the general decline in overall economic activity;
2. difficulties in the cost and availability of consumer credit; and
3. the shift in demand from large automobiles to small, fuel-efficient cars, coupled with domestic producers' failure to satisfy that new demand.[98]

Most significant was the ITC's conclusion that import relief would not aid the automobile producers' recovery: "The transformation of the industry will take place in the absence of any import relief and would not be speeded by relief. . . . The record shows that all investment plans for domestic production are independent of import relief."[99] Perhaps another consequential factor is that at the time of the ITC finding, neither President Carter nor President-elect Reagan appeared willing to move forward to obtain an OMA. Early in his campaign, Presidential candidate Reagan expressed his commitment to free trade and his opposition to import restrictions on automobiles.[100]

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percent in 1979; employment declined approximately 22% percent in the first six months of 1980 compared to employment during the same period in 1979. *Id.* at A-38. Aggregate net operating profit fell by 76% in 1979, from $5.6 billion in 1978 to $1.3 billion in 1979; during the first six months of 1980, the industry reported a loss of $2.9 billion. *Id.* at A-43.

97. *Id.* at 1.

98. *Id.* at 21, 34-35, 67, 133-34, A-67 to -71. See also *Issues Relating to the Domestic Auto Industry: Hearing on S.396 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 97th Cong., 1st Sess., Pt. 1, 180, 185 (1981) [hereinafter cited as *Hearings 97th Cong.*] (statement of Robert M. McElwaine, President, Amer. Int'l Automobile Dealers Assoc.).

99. *ITC Report, supra* note 96, at 161-62. *See Hearings 97th Cong.*, Pt. 1, *supra* note 98, at 189.

100. President Reagan has stated:

> We must continue to resist rising protectionist pressures to keep the world trading system open. Import limitations only lead to foreign retaliation and increased domestic unemployment. . . . Of course free trade should be reciprocal. We should not be expected to stand idly by. It better serves our interests to negotiate for a reduction in a foreign country's trade barriers than to erect more barriers of our own.

Hearings, supra, note 12, at 6.

A. Congressional Response to the Negative Finding of the ITC

In the absence of a determination by the ITC that the injury was caused by imports, the President lacked the authority under section 203 of the Trade Act of 1974 to negotiate an OMA with the Japanese government.[101]

The Ninety-Sixth Congress proposed two joint resolutions to give the President authority to negotiate with foreign governments to limit automobile imports notwithstanding a negative finding by the ITC.[102] The resolutions would give the President authority to negotiate with representatives of foreign governments and enter into and carry out import restriction agreements "whenever the President determines such action appropriate."[103] Neither resolution became law, both dying in the December congressional rush to adjourn.[104]

The Ninety-Seventh Congress also proposed three resolutions which would authorize and encourage the President to negotiate an OMA notwithstanding the ITC's negative finding.[105] These proposed resolutions became moot after the unilateral export restriction was undertaken by the Japanese. In addition to these resolutions, the United States Senate proposed legislation to impose unilateral quotas on the importation of automobiles from Japan during 1981, 1982, and 1983.[106]

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101. 19 U.S.C. § 2252(a) (1976). The statute directs the President to take action to provide import relief, unless he decides such relief is not in the national economic interest of the United States "after receiving a report from the commission."

102. S.J. Res. 193, 96th Cong., 2d Sess. (1980); H.J. Res. 598, 96th Cong., 2d Sess. (1980).

103. *Id.*

104. *Id.*

105. S.J. Res. 5, proposed on Jan. 5, 1981, before the Senate Finance Committee. *See Hearings 97th Cong.*, Pt. 1, *supra* note 98, at 25-27. This resolution would authorize the President to negotiate with foreign governments to obtain import restraint agreements on automobiles, trucks, and auto parts used in assembly. That authority would expire on July 1, 1984. Any agreement would expire on June 30, 1984. H.R.J. Res. 5 was also proposed on Jan. 5, 1981, before the House Ways and Means Committee. *See Hearings* 97th Cong., Pt. 2, *supra* note 98. H.R. Cong. Res. 80 was proposed on Feb. 26, 1981, before the House Ways and Means Committee and the House Foreign Affairs Committee. This concurrent resolution urged the President to enter into negotiations with representatives of the government of Japan with respect to a temporary restraint in Japan's exportation of automobiles into the United States, an equitable relationship between prices charged in domestic and foreign sales, and elimination of trade barriers affecting purchase of American products in Japan.

106. S. 2194, 97th Cong., 2d Sess. (1982); H.R. 5667, 97th Cong., 2d Sess. (1982). Congress has also introduced proposals to establish domestic content requirements for motor vehicles sold in the United States; S. 2300, 97th Cong., 2d Sess. (1982); H.R. 5597, 97th Cong., 2d Sess. (1982); H.R. 6491, 97th Cong., 2d Sess. (1982); Simison, *UAW vs. Japan, Car-Import Bill Gains Strength in Congress; Effect on Jobs Debated*, Wall St. J., Sept. 3, 1982, at 1, col. 6.

B. Japanese Response

In early April of 1981, the United States government sent a special trade mission to Japan.[107] The briefing mission was pointedly described by the United States government as a low-level group whose sole responsibility would be to explain the contents of automobile export restraint proposals. Negotiations or discussions on export levels were specifically excluded from the mission's mandate.[108] Later that month Ambassador William Brock, the United States special trade representative, traveled to Tokyo to conduct general discussions concerning United States-Japan trade policy. However, no negotiations as such took place,[109] and the United States did not enter into any formal agreement for restriction of Japanese automobile exports. Shortly after Ambassador Brock left Japan, the Japanese government announced its decision to "voluntarily" restrict its automobile exports to the United States.[110] The Japanese export restraint program will run for two years from April 1, 1981.[111] In addition, the Japanese government said it will reevaluate the situation in the third year to determine whether the restrictions should be continued.[112]

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107. *See Hearings 97th Cong.*, Pt. 2, *supra* note 98. The text of S.396 is reprinted, *id.* at 3. When Deputy Vice Minister of Japan's Ministry of International Trade and Industry (MITI) Naohiro Amaya returned to Japan from Washington in February 1981, the feeling at MITI was that the United States government wanted a commitment from Japan that it would restrict car exports to the United States and that cabinet-level negotiations would soon begin. In March 1981, MITI officials announced that the Reagan administration would send a briefing mission to Japan on April 6, in conjunction with the release of proposals by President Reagan's cabinet-level auto task force. According to MITI, the briefing mission would discuss details of method and suitable time frame for the Japanese export restraint program. Lincoln, *Automobiles: No Roadmaps Available*, 14 JAPAN INSIGHT [Japan Economic Institute], April 10, 1981, at 1-2.

108. *Id.* at 2.

109. *See* Remarks of Secretary of State Alexander Haig, in U.S. Dep't of St. Bull., Press Release 72 of Mar. 25, 1981, 81:2050 at 29-30. Following Japanese Foreign Minister Ito's official visit to Washington, D.C., March 23-24, 1981, Secretary of State Haig informed the press that there had been meetings in which Foreign Minister Ito had been presented with the situation of the American auto industry, but that no agreement had been made as to what specific steps might be desirable on the part of Japan. Secretary Haig stated in his press release, "We are merely exchanging views on this sensitive and complex matter, and we will continue to do so." *Id.* at 30.

110. *See Mr. Reagan's Gift to Big Auto*, N.Y. Times, May 2, 1981, at 22, col. 1. On May 1, 1981, a nonagreement emerged from the nonnegotiations between United States Special Trade Representative William Brock and Japanese government officials, which put an end to the long and tortuous conflict over imports of Japanese-made automobiles. Lincoln, *Automobiles: Finish with No Winners*, 18 JAPAN INSIGHT [Japan Economic Institute], May 8, 1981, at 1.

111. *Id.*

112. *Id.*

Much public skepticism exists as to the actual voluntariness of this totally unilateral action undertaken by the Japanese.[113] Prior to the nonnegotiations of April 1981, it seemed highly unlikely that the Japanese government would voluntarily agree to limit its automobile exports. The Japanese automakers were then under pressure from the European market to voluntarily cut back their sales.[114] Those European restrictions, together with the Japanese desire to expand their manufacturing capacity, would indicate that Japan had an even stronger need to sell more cars in an unregulated American market.[115] However, faced with the Japanese government's offer to restrict exports, with "Ambassador Brock's acquiescence, and [with] the resulting collapse of congressional action, the Japanese automobile manufacturers had no choice but to accept the decision. Any other response would have brought charges of obstructionism."[116]

C. Effect of Proposed Legislation

The legislation proposed in response to the ITC's negative finding raises several legal issues. As discussed below, legislation authorizing negotiation of an OMA after such action has been precluded by a negative ITC determination might conflict with United States general trade policy, the United States obligations under GATT, and the United States antitrust laws. More importantly, the events that transpired subsequent to the ITC's negative determination reveal a flaw in the 1974 Trade Act itself: the procedure does not provide for a method of ensuring the finality of an ITC determination, while simultaneously appeasing political and economic pressures for import relief.

Imposing import relief in response to pressures exerted by a particular domestic industry would signal a retreat from the free trade policy

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113. *See, e.g., Mr. Reagan's Gift to Big Auto, supra*, note 110; Pine, *Trade Representative Brock Battles Threat of Protectionism in U.S., Other Countries*, Wall St. J., Mar. 23, 1982, at 48, col. 1. As Edward Lincoln has stated:

> To preserve the administration's free-trade image, and presumably to avoid antitrust complications, the Brock trip was not billed as a negotiating exercise. [Brock] was there only to advise the Japanese government as to whether its policies would appease Congress. No one was fooled by this charade. For all practical purposes, the events of the past few weeks amounted to negotiations; the Reagan administration cannot escape responsibility for presiding over a protectionist settlement of the automobile issue.

Lincoln, *supra* note 110, at 2.

114. *See Hearings, supra* note 12, at 7.

115. *See Auto Situation: Autumn 1980 Before the Subcomm. on Trade of the House Ways and Means Comm.*, 96th Cong., 2d Sess. 7 (1980) (statement of Sen. Howard Metzenbaum).

116. Lincoln, *supra* note 110, at 2.

expressed in the Trade Act. It would also undermine one of the major achievements of United States trade policy in the 1979 GATT Tokyo Round negotiations—the winning of commitments by other governments to employ the same type of open, careful, and fair administrative procedures that the United States employs before imposing limitations on imports.[117]

1. GATT and Antitrust Ramifications

More specifically, legislation such as that proposed by the Ninety-Seventh Congress would have adverse ramifications under GATT. Imposition of a legislated import quota following a negative ITC finding could be held contrary to United States obligations under GATT. "Japan, then, could seek compensation in the form of other trade concessions, or could withdraw concessions on other products of interest to the United States."[118] The procedures set out in the Trade Act were specifically designed to provide import relief without violating the United States obligations under GATT.

Article XIX of GATT provides an escape clause from GATT obligations.[119] Article XIX permits a member country to impose quantitative import restrictions *only* in certain circumstances in which imports "cause or threaten serious injury to domestic producers."[120] Throughout the thirty-three years of GATT's operation, "the United States has implemented this principle by requiring that petitioners follow well-defined procedures and obtain an affirmative determination from the ITC."[121]

An affirmative ITC finding signifies that imports are a cause of, or threaten to cause, serious injury to a domestic industry.[122] Thus, the ITC affirmative finding assures compliance with GATT and the escape clause provision of Article XIX. An ITC negative finding, however, implies that the preconditions of Article XIX have not been satisfied. Therefore, any import restriction imposed would be likely to constitute a violation of GATT.

117. *Hearings 97th Cong.*, Pt. 1, *supra* note 98, at 190 (statement of Robert M. McElwaine). The requisite procedure for obtaining import relief is set forth in sections 201-203 of the 1974 Trade Act, 19 U.S.C. §§ 2251-2253 (1976).

118. *Hearings 97th Cong.*, Pt. 2, *supra* note 98, at 80 (statement of Malcolm Baldridge, Secretary of Commerce).

119. *See supra* text accompanying note 73.

120. GATT, art. XIX(1)(a), *supra* note 67, at 260.

121. *Hearings 97th Cong.*, Pt. 1, *supra* note 98, at 190 (statement of Robert M. McElwaine).

122. *See supra* text accompanying notes 38-46.

The proposed legislation also involves risk of violation of the United States antitrust laws. A Senate Joint Resolution states that the act of entering into an automobile export agreement, and actions necessary to implement any agreement, would be exempt from antitrust laws of the United States.[123] It was, however, the threat of antitrust violations which deterred negotiation of a formal OMA after the ITC negative determination.[124] Absent an affirmative finding by the ITC that imports are a substantial cause of a domestic industry's injury, any congressional action to restrict imports or any formal imposition of export limitations by the foreign government involved could violate the intent and policy of United States antitrust laws.[125]

Japanese automakers' compliance with the quota set by the Japanese Ministry of International Trade and Industry would not expose the Japanese industry to antitrust problems in the United States, since the automakers can argue that they were compelled to restrict exports. If compelled by their government, actions by foreign firms in restraint of trade in the United States are not considered to be violations of United States antitrust law.[126]

The question, however, of whether the United States government can press for restrictions on imports outside the framework prescribed in United States trade laws without violating antitrust laws has never been resolved in court. In December of 1980, the United States Department of Justice issued an opinion that the President has the legal authority to negotiate an agreement restricting imports, and that an agreement between the United States and Japanese governments reached as a result of such negotiations would not be an antitrust violation if the foreign government required compliance by its national firms through its own legal process.[127]

In *Sneaker Circus*, the court discussed the implications of OMAs on United States antitrust laws. The court held that if the finding of the ITC and actions by the President were in conformity with the provisions of the Trade Act, then the ITC determination, the President's action, and the OMAs resulting therefrom are not in violation of section 1

123. S.J. Res. 5, 97th Cong., 1st Sess., 25-27 (1981).

124. *See* Lincoln, *supra* note 107.

125. *Hearings 97th Cong.* Pt. 1, *supra* note 98, at 191 (statement of Robert M. McElwaine). *See* Sherman Antitrust Act, 15 U.S.C. § 1-XX (1976).

126. Lincoln, *supra* note 110, at 2.

127. Dec. 29, 1980, letter from Assoc. Att'y Gen. John H. Shenefield to Sen. Carl Levin of Michigan in response to Sen. Levin's written inquiry. *See Hearings 97th Cong.* Pt. 1, *supra* note 98, at 156 (statement of Howard D. Samuel).

of the Sherman Antitrust Act.[128] Citing the United States Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the district court stated, "Where a restraint upon trade . . . is the result of *valid* governmental action . . . no violation of the [Sherman] Act can be made out."[129]

No court has yet specifically addressed the antitrust ramifications of an OMA procured outside the provisions and procedures of the Trade Act. The *Sneaker Circus* decision and the Supreme Court's holding in *Eastern Railroad*, however, give no assurance that a non-Trade Act OMA would be immune from antitrust laws.

2. Effect on the Trade Act of 1974

Aside from the GATT and antitrust implications, an OMA negotiated subsequent to an ITC negative finding would do great violence to the Trade Act itself. Of major concern is whether the President has or should have the authority to negotiate an OMA on his own initiative without fulfilling the procedural requirements of the Trade Act of 1974.

In order to achieve the fundamental goal of the Trade Act of 1974, which is the promotion of free trade with some protection of domestic industries, Congress delegated the power to determine the necessity of import relief to an independent fact-finding body, the ITC.[130] The decision of the ITC should be final and determinative, otherwise its function in the import relief process would be essentially meaningless. If Congress and the President were to act without regard to an ITC determination that circumstances did not warrant import relief, there would be no purpose to the statutory procedural requirements.

A conflict exists between the need to preserve the independent role of the ITC and the desire to respond to domestic pressures for import relief. Under the present statute, a negative finding by the ITC precludes any type of import relief.[131] Pressures from the ailing domestic industry and the effect of the industry's failures upon the national economy, however, prompted Congress and the President to respond by attempting to effectuate some form of import relief in disregard of the ITC's finding.

The proposed legislation of the Ninety-Sixth and Ninety-Seventh Congresses raise important legal questions which are likely to recur.

128. 457 F. Supp. at 796.

129. *Id.* (citing Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (emphasis added)).

130. *See supra* text accompanying notes 6, 38-42.

131. *See supra* text accompanying note 101.

The question of Presidential authority to act without regard to an ITC determination or the procedures established in the Trade Act has not been addressed judicially. Case law does, however, provide some authority as to the scope of the President's powers in negotiating an OMA.

In 1974, a consumer group, Consumers Union, brought suit challenging voluntary, nonbinding export restraint agreements entered into between the United States and foreign steel-producer associations, outside the scope of the Trade Expansion Act of 1962 (precursor to the Trade Act of 1974).[132] The *Consumers Union* court held that the President was not required to follow statutory procedures for restricting imports as long as his efforts did not create legally enforceable obligations.[133]

In light of the looser standard in the 1974 Act of substantial cause rather than major cause, it is debatable whether *Consumers Union* would have been decided differently under the Trade Act of 1974. The Senate Finance Committee, in its report of the bill that became the Trade Act of 1974, noted that the President had been resorting to nonbinding voluntary export restraint agreements because of the difficulty under the 1962 Act of proving that imports were a major cause of injury.[134] The 1974 Act relaxed the standard to substantial cause, thus increasing the opportunity for obtaining import relief, including OMAs.

By relaxing the standard in the 1974 Act, Congress enabled more OMAs to be negotiated pursuant to the explicit procedural requirements of the Act. *Consumers Union*, however, involved a VRA, not an OMA. VRAs, whereby the President merely urges an exporting industry or nation to voluntarily limit its exports aimed toward the United States, do not involve government-to-government agreements and are not governed by statutory prerequisites, even under the 1974 Act.[135]

132. Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974).

133. *Id.* at 143-44.

134. S. REP. NO. 1298, *supra* note 33, at 7263.

135. *OMA Panel, supra* note 59, at 3. Professor Kirgis states:

> One could infer from this that Congress intended to preempt the President's authority to participate in even the non-binding type of arrangement, unless the full statutory investigation procedure set out in the 1974 Act is followed. But . . . there is real doubt whether Congress can preclude the President from negotiating arrangements which purport neither to bind the United States under international law nor to create federal law in the United States.

Id. Kirgis concludes that if the President negotiates a nonbinding OMA, the arrangement will be upheld even if the President did not strictly adhere to the statutory procedures because of the President's own foreign affairs powers to negotiate under the Constitution. *Id.*

Thus, *Consumers Union* does not support the argument that the President may negotiate an OMA without following the procedural requirements of the Trade Act.

It is arguable that the President should have authority to negotiate an OMA notwithstanding a negative finding by the ITC because the President has already been given the authority to exercise discretion in the substance of OMAs. The substance of the agreements constitutes a political question beyond the scope of judicial review.[136]

On the other hand, the President's power to promulgate import relief under the Trade Act is not absolute. For example, section 203 of the Act prohibits the President from increasing tariffs absent an affirmative determination by the ITC.[137] Furthermore, if the President decides to take action other than that recommended by the ITC, or if he decides that he will not provide import relief, Congress may disapprove the President's decision, and the action recommended by the ITC will take effect.[138]

The proposed legislation provided preconditions to the President's power to negotiate an OMA, thus ensuring that import relief would only be implemented when imports were the cause of a domestic industry's injury. Senate Joint Resolution 5, subsection (b), would place two preconditions on any negotiation:

1. the President would have to consider that the imports were causing, or threatening to cause, serious injury to the domestic industry; and
2. the President would have to be satisfied that the domestic industry has exhausted remedies under section 201 of the Trade Act of 1974.[139]

In effect, this subsection would authorize the President to assume the fact-finding role that was assigned by Congress to the ITC.

OMAs negotiated subsequent to a negative determination by the ITC would be contrary to the autonomy and fact-finding power Congress has delegated to that body. Until now, Congress has maintained the position of the ITC as an independent body, responsive to both the President and Congress, but under the direct control of neither.[140]

136. *Sneaker Circus*, 457 F. Supp. at 791.

137. 19 U.S.C. § 2253(f)(1)-(4) (1976).

138. 19 U.S.C. § 2253(c)(1) (1976).

139. S.J. Res. 5, 97th Cong., 1st Sess. (1981).

140. In a report on the proposed Trade Act of 1974, the House Ways and Means Committee remarked that the ITC's judgment relating to injury from imports would be determinative:

Judicial review of ITC decisions is limited in scope, and courts will defer to the ITC's inherent expertise as a finder of facts. In defining the scope of judicial review of an ITC determination, the United States District Court stated in *Sneaker Circus* that

> [i]ndeed, it would be both unfeasible and impractical for the court to attempt to review the merits of a determination which rests on complex and subtle evaluations of technical economic data about which the ITC is far more expert than the court. . . . The court must determine only whether the ITC decision was arbitrary, capricious or an abuse of discretion.[141]

Congress created the section 201 process for implementing import relief, and specifically delegated to the ITC some of its constitutional authority to regulate foreign commerce. Congress also purposefully interposed the ITC into the process in order to ensure that the decision to recommend import relief would not be subject to political pressures.

The proposed legislation would virtually destroy the authority and independence of the ITC by allowing Congress to override the decisions of the ITC whenever those decisions turn out to be unpopular.

V. RECOMMENDATION AND CONCLUSION

The controversy surrounding the propriety of import relief in the automobile industry situation illustrates the dilemma presented by a negative determination of the ITC, especially when the finding reflects strong disagreement among the commissioners themselves. The vote against authorizing import relief for the United States automobile industry in 1980 was three-to-two. Such a divided determination of fact implies that import relief is not blatantly unwarranted. When the facts are so close, it is inevitable that domestic pressures for some form of relief will continue beyond the issuance of the ITC's determination. Such a situation leads to congressional and executive attempts to provide relief for the domestic industry despite the ITC's negative determination.

Implementation of import relief in defiance of the ITC's negative determination creates adverse implications on United States trade pol-

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> The Committee did not intend that an industry would satisfy the eligibility criteria for import relief by showing that all, or some of the enumerated factors, were present at the time of its petition to the Tariff Commission [predecessor to the ITC]. That is a judgment to be made by the Tariff Commission on the basis of all factors it considers relevant.

H.R. REP. No. 571, 39d Cong., 1st Sess. at 47 (1973).

141. 457 F. Supp. at 787.

icy and has ramifications on United States obligations under GATT as well as United States antitrust laws. Most significantly, such action undermines the essential function of the ITC as well as the carefully crafted procedures established in the Trade Act of 1974. The need to abrogate the procedures established by the Trade Act can be eliminated by a minor amendment of the statute. Such an amendment would provide a method to appease domestic pressures for import relief in a manner consistent with the policy of the Act.

Under present law, a single affirmative ITC finding has the potential of triggering a number of types of relief, including both voluntary government-to-government agreements and unilaterally imposed import restrictions, tariffs, and duties.[142] The effects of voluntary agreements and unilateral action are distinguishable, and the standards and procedures giving rise to the two types of actions should be different.

The ITC should be permitted to issue an affirmative determination that imports are a cause of a domestic industry's injury, but that the only type of relief warranted by the situation is an OMA. In a controversial factual situation, such as the one analyzed herein, the ITC would be more likely to issue a finding authorizing relief if the only type available would be a voluntary agreement between the two governments. Thus, the determination that import relief is warranted would continue to be based upon the ITC's independent factual investigation, rather than upon the political and industrial pressures which would influence a congressional or executive determination. Most importantly, the ITC's status as an independent fact-finding body would be preserved. As a result, the United States would uphold its commitment to the Trade Act's fundamental purpose: to promote free world trade by imposing import restrictions only when justified by exigent circumstances.

142. *See supra* text accompanying notes 56-58.